

IN THE MATTER OF

RAJESH CHOPRA

Petitioner

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BEFORE THE

HOWARD COUNTY

BOARD OF APPEALS

BA Case No. 09-022C&V

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DECISION AND ORDER

The Howard County Board of Appeals (the "Board") convened on December 8, 2009, January 28, 2010, and April 22, 2010 to hear and deliberate the petition of Rajesh Chopra for approval of a 16-bed Nursing Home and Residential Care Facility Conditional Use (an assisted living facility), and variances to reduce the 75-foot principal structure setback from a collector public street right-of-way to 50 feet for a building, and to reduce the 50-foot front setback to 27 feet for a privacy fence in an RR-DEO (Rural Residential: Density Exchange Option) Zoning District, filed pursuant to Sections 131.N.37 and 130.B.2 of the Howard County Zoning Regulations (the "Zoning Regulations").

Protestants Lizanne Davis and Dan O'Leary provided certifications that the notice of hearing was advertised and that the property owner and the adjoining property owners received notice of the hearing. The Board members indicated that they had viewed the property as required by the Zoning Regulations. Barry M. Sanders, Assistant County Solicitor, served as legal advisor to the Board.

This case was conducted in accordance with Section 2.209 of the Board's Rules of Procedure. The Howard County Code, the Howard County Charter, the Howard County Zoning Regulations, the Department of Planning and Zoning Technical Staff Report dated August 3, 2009, the General Plan for Howard County, the General Plan of Highways, and

the Petition and plat submitted by the Petitioner were incorporated into the record by reference.

Sang Oh, Esquire, represented the Petitioner. Robert Vogel, Joseph Rutter and Mickey Cornelius testified in favor of the petition. Paul Collison, Susan Scheidt, John Lehman, Glenn Price, Lizanne Davis, Hilda Mathieu, and Dan O'Leary, representing the Greater Highland Crossroad Association, testified in opposition to the petition.

Exhibits

The Petitioner introduced into evidence the exhibits as follows.

1. Joseph W. Rutter, Jr., Curriculum Vitae
2. Floor plans
3. Elevation plans
4. Assessment and Taxation records
5. Area Map
6. Policy 4.3 of the General Plan
7. Letter dated 10/21/09 from Mr. Cornelius/Traffic Group to Joseph Rutter
re: Highland Assisted Living – Traffic Access Evaluation
8. Colorized version of Conditional Use Plan
9. Percolation Certification Plan

The Opponents introduced into evidence the exhibits as follows.

1. Packet titled "Properties within Paternal Gift Property" (including tax records)
2. Packet titled "Neighboring Vicinal Properties to Subject Property (including tax records)
3. Packet titled "Koandah Gardens" (including tax records)

4. Packet titled "Properties within the Greater Highland Village" (including tax records)
5. Packet labeled "1-16 Bed Assisted Living Homes Located in the Greater Highland Area" (including tax records)
6. Comparison of properties in Highland Area (including tax records)
7. E-mail dated 1/22/10 from S. Sappington (Health Dept.) to Lizanne Davis re: septic
8. E-mail dated 11/25/09 from Capt. Jones/Ho.Co.Police Dept. to Daniel O'Leary re: Highland and GHCA
9. Page 63 of the General Plan
10. Page from website of Department of Planning and Zoning

FINDINGS OF FACT

Based upon the testimony and exhibits presented at the hearings, the Board makes the following Findings of Fact:

1. The 1.15-acre (49,910 square feet) generally rectangular subject property is located in the 5th Election District on the north side of Clarksville Pike (MD 108) about 750 feet northeast of Highland Road. It has a street address of 13306 Clarksville Pike and is referenced on Tax Map 40, Grid 5, as Parcel 66 (the "Property").

2. The Property is approximately 166 feet wide, 297 feet deep along the northeast side lot line and 321 feet deep along the southwest side lot line. It is improved by a two-story, frame, single-family detached dwelling sited in the southeast portion, less than 50 feet from the possible future right-of-way line, according to the Amended Conditional Use Plan dated March 2009. To the dwelling's northwest is a large accessory building. A paved driveway provides access from Clarksville Pike and runs past the house to the accessory

building. The Property is dotted by trees and vegetation along its perimeters, with the remainder of the Property in open lawn.

3. The adjoining property to the southwest is the site of the Highland Crossing commercial development. The closest portion of this development is zoned CCT (Community Center Transition) and is improved with condominium office buildings. Further southwest, the B-1 portion of Highland Crossing is used for retail and commercial service business.

Other adjacent properties are zoned RR-DEO. Parcels 46 and 514 to the north and northwest are each improved with a single-family detached dwelling, with long driveways off Highland Avenue. Parcel 264 to the northeast is improved with a single-family detached dwelling fronting on MD 108. Across MD 108 to the southeast is Parcel 74, a two-lot site, with the south lot improved with a one and one-half story single-family detached dwelling fronting on MD 108.

4. MD 108 in this location has two travel lanes and approximately 27 feet of paving within a proposed 80 foot wide right-of-way. The posted speed limit is 35 miles per hour. The TSR report indicates that the estimated sight distance from the existing driveway entrance is over 800 feet to the northeast. The sight distance to the southwest is currently limited due to existing vegetation, but once this is removed with road improvements to MD 108, the sight distance would be over 750 feet to the Highland Road/MD 216 intersection and beyond.

According to data from the State Highway Administration, the traffic volume on MD 108 north of MD 216 was 14,732 average daily trips as of 2007.

5. The site is served by private well and septic. On the Amended Conditional Use Plan, wells are depicted on the proposed building's southeast side. The large septic area would be located behind the proposed building, to the north and northwest.

6. The Property is designated "Rural Residential" on the Policies Map 2000-2020 of the 2000 General Plan. The General Plan Transportation Map depicts MD 108 in this location as a Major Collector.

7. The Petitioner proposes to redevelop the use of the Property for an assisted living facility. This facility would have 16 beds for assisted living residents and an apartment for a resident manager. The proposed building would be two-stories, with approximately 9,500 square feet of floor area and would be located generally in the southeastern portion of the Property and 50 feet from the future MD 108 ROW. A new, wider driveway, to be located in about the same location as the existing drive, would provide access to an 8-space parking lot adjoining the building on its northeast side. As permitted by Section 131.N.37.d, the Petitioner is requesting that the Board approve a 22-foot reduction in the 50-foot setback from the northeastern residentially zoned property to accommodate the parking spaces.

The Petitioner is also seeking a variance to reduce the 75-foot setback from MD 108 future right-of-way line to 50-feet for the building, and a variance to reduce the 50-foot setback to 27 feet for a privacy fence.

8. Robert Vogel, a professional engineer, testified as to the details of the proposed conditional use plan. Mr. Vogel stated that the Property is smaller and narrower than typical RR properties, which creates practical difficulties in developing the Property, considering the impact of the 50-foot residential setback to the northeast and the 75-foot front setback dedication requirements. Mr. Vogel noted that bringing the building closer to the road

would also make a good transition between the commercial uses to the south and increase the distance from the dwellings behind the Property.

9. Joseph Rutter, a planner, testified for the Petitioner that the building would be compatible in scale and architecture with residential development in the vicinity. Mr. Rutter stated that the proposed building would have residential characteristics. Mr. Rutter opines that the proposed use is consistent with the General Plan policies which call for an increase in housing and assisted living opportunities for older residents. In rebuttal testimony, Mr. Rutter stated that the actual use determines the required number of parking spaces.

10. Mickey Cornelius, a traffic engineer, testified that the proposed assisted living facility with 16 beds is projected to generate 43 daily trips and 2-4 weekday morning and evening peak hour trips. Mr. Cornelius stated that the proposed assisted living facility generates less traffic than 5 single family dwelling units and that acceleration/deceleration lanes would not be required by State Highway Administration. Mr. Cornelius testified that the proposed driveway will provide adequate sight distance looking in both directions and that the proposed driveway will provide for safe ingress and egress to and from the site.

11. Paul Collison testified in opposition to the petition and stated that the proposed facility will change the character of the neighborhood from residential to commercial and that building as proposed will not blend with the existing neighborhood.

12. Susan Scheidt testified in opposition to the petition and stated that the homes in the Paternal Gift development are approximately 4.25 acres in lot size and should not be used as comparables since they are not adjacent to the proposed building. Ms. Scheidt stated that the proposed building is out of scale and character with other residences along MD 108 and Highland Road.

13. John Lehman, an architect, testified in opposition to the petition and stated that the proposed building is extremely large for the size of the lot and that the proposed building does not fit into the general characteristics of the neighborhood. Mr. Lehman noted that the building has an institutional look due to its size and scale and the number of parking spaces proposed. Mr. Lehman noted that the nearby residential properties along MD 108 are in the vicinity of a 1,000 to 2,000 square foot range. Mr. Lehman stated that most of the nearby residences are designed as ranchers and bungalows. Mr. Lehman opined that the adverse effects generated at this site would be greater here than at other RR zoned lots, due to the size of the lot, size of the structure, large septic area and parking lot.

14. Glenn Price testified in opposition to the petition and stated that he lives on the adjacent Parcel 264 to the northeast which is improved with a single-family detached dwelling. Mr. Price opposes the Petitioner's request to approve a 22-foot reduction in the 50-foot setback from his northeastern residentially zoned property to accommodate the parking spaces. Mr. Price stated that the proposed fence and landscaping will not adequately buffer the use from his property. Mr. Price stated that the proposed size of the building necessitates the variance request in this case.

15. Lizanne Davis testified in opposition to the petition and voiced her concerns over the inordinate size of the institutional building and the inordinate size of the associated commercial septic system being squeezed into a one acre lot. Ms. Davis noted that the site plan reveals a very large area behind the proposed building devoted to the large septic area required by a 16 bed assisted living facility.

16. Hilda Mathieu testified in opposition to the petition and stated that her desire was to keep the historic and residential aspects of the community intact. Ms. Mathieu expressed

her concern regarding an institutional use being placed in a residential area.

17. Dan O'Leary, representing the Greater Highland Crossroads Association, testified in opposition to the petition and stated the Petitioner failed to establish compliance that the proposed conditional use will have adequate parking as required and that the plan does not provide off-street loading facilities as required under the regulations. Mr. O'Leary noted that the proposed plan lacks the required 2 parking spaces for the proposed resident manager's apartment. Mr. O'Leary stated that the Petitioner has failed to produce evidence to establish "uniqueness", a necessary variance criteria under the Zoning Regulations. Mr. O'Leary asserted that the Petitioner has failed to show that the subject site is in any way peculiar, unusual, or unique when compared to other properties in the neighborhood such that the impact of the bulk regulations of the RR district upon the subject property would be different than the impact of the regulations upon other neighboring properties. Mr. O'Leary stated that the scale and mass of the proposed structure is approximately three times that of the average residential structure in Highland and is completely out of character for Highland as it exists today as a rural community village.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the Board makes the following Conclusions of Law:

I. General Criteria for Conditional Uses (Section 131.B).

A. Harmony with the General Plan: Section 131.B.1 of the Zoning Regulations requires that a conditional use plan will be in harmony with the land uses and policies indicated in the General Plan for the district in which it is located. The Howard County 2000 General Plan designates the area in which the Property is located as a "Rural

Residential Area”. Chapter 4 of the General Plan stresses the County’s need to provide for a significant increase in the elderly population, including specialized housing, observing that assisted living in small group homes is more affordable. Policy 4.3 supports the “expansion of affordable congregate housing arrangements throughout the County for the elderly, the disabled and special populations”. Policy 4.22 supports residential opportunities to “[m]eet the needs of special populations in a more traditional residential neighborhood setting...”

The proposed conditional use petition is for a 16-bed, assisted living facility and an apartment for a resident manager on a 1.15-acre site. Although the TSR and several witnesses described the proposed facility as an institutional use, General Plan Policy 4.3 alternatively characterizes the use as a congregate living/housing arrangement and on Page 82 of Chapter 4, stresses the need for additional senior housing for populations needing various levels of support and services. The nature of the proposed conditional use, while institutional, has a strong residential character.

Although the site’s size appears to be somewhat small based upon the variance request, the Property nonetheless complies with the 40,000 minimum square feet required by Section 131.N.37, even if the ROW is factored out.

The Property fronts on MD 108, a Major Collector, and it is close to MD 216, a Minor Arterial.

Consequently, the Board finds that the nature and intensity of the proposed conditional use, the size of the site in relation to the use, and the location of the site with respect to streets giving access to the site, are such that the conditional use plan will not be in harmony with the land uses and policies indicated in the Howard County General Plan for the district in which it is located, in compliance with Section 131.B.1.a. The conditional use

will not be combined with other conditional or permitted uses; therefore, Section 131.B.1.b. does not apply.

B. Adverse Effects. Unlike Section 131.B.1, which concerns the proposed use's harmony or compatibility with the General Plan, compatibility with the neighborhood is measured under Section 131.B.2's four "adverse effect" criteria: (a) physical conditions; (b) structures and landscaping; (c) parking areas and loading, and; (d) access.

When assessing a proposed conditional use under these criteria, we must first recognize that virtually every human activity has the potential for adverse impact. Zoning recognizes this fact and, when concerned with conditional uses, accepts some level of such impact in light of the beneficial purposes the zoning body has determined to be inherent in the use. Thus, the question in the matter before us is not whether the proposed use would have adverse effects in a RR-DEO District. The proper question is whether there are facts and circumstances showing that the particular use proposed at the particular location would have any adverse effects above and beyond those inherently associated with such a conditional use irrespective of its location within the zone. *People's Counsel for Baltimore County v. Loyola College in Maryland*, 406 Md. 54, 956 A.2d 166 (2008); *Schultz v. Pritts*, 291 Md. 1, 432 A.2d 1319 (1981); *Mossburg v. Montgomery County*, 107 Md. App. 1, 666A.2d 1253 (1995).

For the reasons stated below, the Petitioner has failed to meet its burden of presenting sufficient evidence under Section 131.B.2 of the Zoning Regulations to establish this proposed use will not have adverse effects on vicinal properties beyond those ordinarily associated with the assisted living facility.

1. Physical Conditions. This type of use is predominantly an indoor use and would not generate inordinate noise, dust, fumes, odors, glare, vibrations or hazards. No dumpster or outdoor parking lighting is proposed. Consequently, the impact of any inherent operational adverse effects resulting from the proposed conditional use will not be greater at the subject site than it would be generally elsewhere in the RR-DEO zone, in accordance with Section 131.B.2.a.

2. Structures and Landscaping. The proposed building would be two-stories, with approximately 9,500 square feet of floor area and would be located generally in the southeastern portion of the Property. The proposed building complies with the RR District side and rear setbacks and complies with the Section 131.N.37 requirement for setbacks from residentially zoned properties. The building height would comply with the height regulations for the RR District. The proposed parking lot would be approximately 28 feet from the adjoining residential parcel to the northeast and the Petitioner requests a reduction in the Section 131.N.37.d requirement for a 50-foot setback for this parking lot. In support of this reduction request, the Petitioner is proposing to locate a six-foot high privacy fence along the side of the parking lot and landscaping between this fence and the adjoining parcel. The Board concludes that the proposed fence and landscaping will not adequately buffer the neighboring residential property to the northeast from the parking area use. As such, the Board is unable to conclude that the location, nature, and height of structures, walls and fences, and the nature and extent of landscaping on the site are such that the uses will not hinder or discourage the use or development of the adjacent land and structures more at the subject site than they would generally elsewhere in the zone, in compliance with Section 131.B.2.b.

3. Parking and Drives. The Petitioner proposes an eight-space parking area adjoining the northeast side of the building and eight spaces are required under Section 133. However, no parking spaces are being provided for the resident manager's apartment as required by the Zoning Regulations. As such, the Board concludes that the Petitioner has not met its burden of demonstrating compliance with Section 131.B.2.c.

4. Safe Access. The Board concludes that the ingress/egress drive will provide safe access with adequate sight distance upon removal of the existing vegetation in the Property's southeast corner. Acceleration and deceleration lanes may not be necessary for this particular use at this particular location. Consequently, the ingress and egress drive will provide safe access with adequate sight distance, as required by Section 131.B.2.d.

II. Specific Criteria for Nursing Homes and Residential Care Facilities (Section 131.N.37).

1. The proposed use will have a maximum of 16 beds, in accordance with Section 131.N.37.a.

2. The lot for which the home is proposed is at least 40,000 square feet in size as required by Section 131.N.37.b

3. The Board concludes that while the proposed building would have residential characteristics such as gable roofs and a front porch, that the proposed building is not reasonably compatible in scale and character with the existing residential development in the vicinity as required by Section 131.N.37.c. The proposed building's residential characteristics will not reduce the appearance of its bulk since the building is much larger than neighborhood residences.

4. The proposed building and parking areas are more than 50 feet from all residentially zoned properties to the rear in compliance with Section 131.N.37.d. Because the parking area lies within the 50-foot setback from the residential zoned property to the northeast, Parcel 264, the Petitioner is requesting that the Board reduce the setback to 28 feet, the distance from the parking area to the northeast lot line under Section 131.N.37.d.(2). In support of this reduction request, the Petitioner is proposing to locate a six-foot high, white vinyl privacy fence and a Type C landscaping buffer. The Board concludes that the proposed fence and landscaping will be inadequate for the proposed use and will not present an attractive and effective buffer for the neighboring residential property to the northeast, namely, Parcel 264.

5. Sixty-seven percent (67%) of the total area of the building envelope will be green space, in accordance with Section 131.N.37.e.

6. Based upon the Board's concluding that the Petitioner has not met the general and specific criteria for the proposed use, the Board need not address the variance petition.

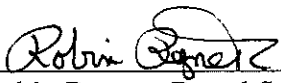
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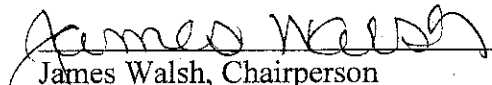
Based upon the foregoing, it is this 23rd day of August, 2011, by the Howard County Board of Appeals, **ORDERED:**

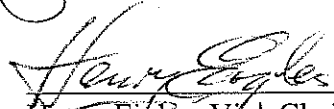
That the petitions of Rajesh Chopra for approval of a 16-bed Nursing Home and Residential Care Facility Conditional Use (an assisted living facility), and variances to reduce the 75-foot principal structure setback from a collector public street right-of-way to 50 feet for a building and to reduce the 50-foot front setback to 27 feet for a privacy fence in an RR-DEO (Rural Residential: Density Exchange Option) Zoning District, are hereby, **DENIED.**

ATTEST:

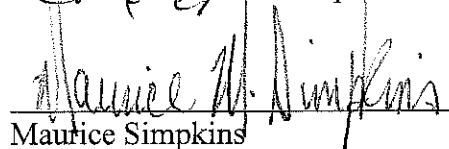
HOWARD COUNTY BOARD
OF APPEALS

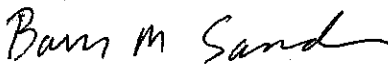

Robin Regner, Board Secretary


James Walsh, Chairperson


Henry Eagles, Vice Chairperson

PREPARED BY:
HOWARD COUNTY OFFICE OF LAW
MARGARET ANN NOLAN
COUNTY SOLICITOR


Maurice Simpkins


Barry M. Sanders
Assistant County Solicitor

Did Not Participate
*John Lederer

Did Not Participate
*James Howard

* Board Members John Lederer and James Howard replaced former members Albert Hayes and Kevin Doyle who presided at the hearings, however, their terms of service with the Board of Appeals expired prior to the issuance of this Decision and Order.